

December 3, 2018

Office of Governor Jim Justice
State Capitol
1900 Kanawha Boulevard, East
Charleston, WV 25305

By mail and via fax to 304-558-1962 (fax)

To whom it may concern,

The American Civil Liberties Union of West Virginia (“ACLU-WV”) is encouraged by Governor Justice’s public call for a thorough investigation into the November 19, 2018 incident in Martinsburg involving a 16-year-old male and members of law enforcement. In the further interest of transparency to the public, the ACLU-WV pursuant to West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1 *et seq.* (“FOIA”), requests documents and communications regarding the incident.

This request includes but is not limited to all records or communications preserved in electronic or written form, *including but not limited to* correspondence, data, directives, documents, videotapes, audio tapes, email, text messages, faxes, files, guidance, guidelines, evaluations, instructions, **messages sent on social media platforms**, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, or studies. Please note that this request also includes a request for any communications sent using personal phones, email accounts, and social media accounts.¹ The date range for these requests, unless otherwise noted, is from January 1, 2018 to the present.

1. Any and all correspondence relating to the November 19, 2018 incident in Martinsburg involving Trooper Derek Walker and Trooper Michael Kennedy and any other members of law enforcement and a 16-year-old male.
2. Any and all video (including, but not limited to dashcam video) received and/or reviewed by any person or employee at the Governor’s office relating to the November 19, 2018 incident in Martinsburg involving Trooper Derek Walker and Trooper Michael Kennedy and any other members of law enforcement and a 16-year-old male.
3. Any and all documents received and/or reviewed by any person or employee at the Governor’s office relating to the November 19, 2018 incident in Martinsburg involving Trooper Derek Walker and Trooper Michael Kennedy and a 16-year-old male.

¹ Official records in the personal control of a government official are government records and subject to sunshine laws. *See, e.g., Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016) (“[A]n agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door or because he is the head of the agency.”)

If you are not technically the custodian of the documents described in this request, I ask that you forward the request to the custodian(s) or advise me of the identity of the custodian(s) so that I can make the request directly to that person or those persons.

Please note that W. Va. Code § 29B-1-3 requires agencies to respond to requests for public records within **five business days**. If you anticipate that it will take longer than five business days, or have questions about the scope of this request, please call me at (304)-345-9246.

Additionally, while W. Va. Code § 29B-1-3(5) permits public agencies to assess fees associated with the reproduction of public records, as a not-for-profit advocacy organization we request a waiver of any fees associated with the furnishing of these documents. To limit costs, electronic production of documents would be preferable. If you do intend to assess fees, however, please contact me for authorization of any fees in excess of \$100.

West Virginia's Freedom of Information Act is "liberally construed with the view of carrying out" a policy of disclosure, while exemptions are to be narrowly construed. W. Va. Code §29B-1-1. Any party claiming that an exemption applies bears the burden of proving its applicability. *See Daily Gazette v. W. Va. Dev. Office*, 482 S.E.2d 180, 187 (W. Va. 1996). Documents regarding policies of public agencies after the policies have been formulated are not subject to the "internal memoranda or letters" exemption to the WV-FOIA provisions. *See id.* at 192. Finally, for any undisclosed or redacted records, we request a *Vaughn* index.

Thank you in advance for your prompt response. Please furnish all records to:

Loree Stark
ACLU of WV Foundation
P.O. Box 3952
Charleston, WV 25339-3952

If you have any questions or concerns, I can be reached at (304) 345-9246 or lstark1@acluwv.org.

Regards,



Loree Stark
Legal Director, ACLU-WV*

*Licensed in Kentucky and eligible for admission in West Virginia courts *pro hac vice*